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The Conventions of Constitutional Amendment in Canada

Richard Albert
ralbert@bc.edu

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Keywords:
Constitutional Amendment, Constitutional Conventions, Constitution of Canada, Referendum, Jennings Test, Patriation Reference, Secession Reference, Senate Reform Reference, Charlottetown Accord, Meech Lake Accord

Author(s):
Richard Albert
Boston College Law School
E: richard.albert@bc.edu

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Richard Albert

Associate Professor
Boston College Law School

THE CONVENTIONS OF CONSTITUTIONAL AMENDMENT IN CANADA

RICHARD ALBERT[†]

Commentators have suggested that the unsuccessful national referendum to ratify the 1992 Charlottetown Accord has created an expectation of popular participation requiring national referendal consultation in major reforms to the Constitution of Canada. In this Article, I inquire whether federal political actors are bound by a constitutional convention of national referendal consultation for formal amendments to the basic structure of the Constitution of Canada. Drawing from the Supreme Court of Canada's Patriation Reference, I suggest that we cannot know whether federal political actors are bound by such a convention until they are confronted with the question whether or not to hold a national referendum in connection with a change to the Constitution's basic structure. I conclude by suggesting, perhaps counterintuitively, that layering a conventional requirement of national referendal consultation onto the existing requirements for formal amendments to the Constitution's basic structure could well undermine democracy, despite our common association of referenda with democratic legitimacy. I suggest instead that a national referendum should be an alternative path, not an additional step, in constitutional amendment.

[†] Associate Professor, Boston College Law School; Visiting Associate Professor of Law and Canadian Bicentennial Visiting Associate Professor of Political Science, Yale University (2015-16); Yale University (J.D., B.A.); Oxford University (B.C.L.); Harvard University (LL.M.). Email: richard.albert@bc.edu. For comments and conversations, I am grateful to Jamie Cameron, Joel Colón-Ríos, Oran Doyle, Rick Kay, David Kenny, David Prendergast, Yaniv Roznai, Scott Stephenson, Katie Young, and participants at the conference on Constitution-Making and Constitutional Design sponsored by the Clough Center for the Study of Constitutional Democracy at Boston College and also at the conference on Conventional Constitutionalism at Trinity College Dublin. I thank the anonymous reviewers, commissioned by the Osgoode Hall Law Journal, for their constructive comments on an earlier draft of this Article.

I. INTRODUCTION

Codified constitutions commonly entrench formal amendment rules authorizing alterations to their text.[1] These rules, however, are susceptible to informal changes, as I am currently demonstrating with reference to constitutions across the democratic world,[2] and as I have already shown in Canada, where the Constitution's escalating structure of formal amendment has been modified by judicial interpretation, federal and provincial law, and also by political practice.[3] Partly codified and uncodified, the Constitution of Canada is peculiarly susceptible to informal changes that arise when new constitutional conventions fill or create a void in the constitutional text, or when they refine or substitute parts of the text.[4] Two examples in Canada are the twin conventions that now exist against using the federal powers of reservation and disallowance—powers that today nonetheless remain textually entrenched.[5] The susceptibility of the Constitution of Canada to informal changes like these raises an important question: could the Constitution's *formal* amendment rules be informally changed by a constitutional convention?

For much of Canadian history and with only a few exceptions,[6] the power to formally amend the codified Constitution of Canada—the *Constitution Act, 1867*,[7] a statute passed by the Imperial Parliament—belonged to the Parliament of the United Kingdom.[8] Canada finally acquired the power to formally amend its own constitution more than a century after Confederation, when the *Constitution Act, 1982* created an escalating structure of formal amendment that was fully and independently deployable by Canadian political actors.[9] It took roughly fifteen unsuccessful attempts over the course of six decades to reach agreement on the intricate design of those rules.[10]

Soon after the coming-into-force of the *Constitution Act, 1982*, Canada's new formal amendment rules became the subject of major constitutional reform efforts in the 1987 Meech

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[1] *See* Francesco Giovannoni, "Amendment Rules in Constitutions" (2003) 115 Pub. Choice 37 at 37.
[2] Richard Albert, *The Democratic Values of Constitutional Amendment* (forthcoming with Oxford University Press).
[3] Richard Albert, "Constitutional Amendment by Stealth" (2015) 60 McGill L.J. 673 at 689-92.
[4] Richard Albert, "How Unwritten Constitutional Norms Change Written Constitution" (forthcoming 2016) 38 Dublin Univ. L.J., available online at: http://ssrn.com/abstract=2628460 (last visited December 1, 2015).
[5] *See* Richard Albert, "Constitutional Amendment by Constitutional Desuetude" (2014) 62 Am. J. Comp. L. 641 at 660-69.
[6] *See* Richard Albert, "Amending Constitutional Amendment Rules" (2015) 13 Int'l J. Const. L. 655 at 673 (identifying the exceptions to the general rule that only the Imperial Parliament could amend the Constitution).
[7] The Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.) (hereinafter "*Constitution Act, 1867*").
[8] *See* Richard S. Kay, "Constitutional Chrononomy" (2000) 13 Ratio Juris 31 at 42-43.
[9] *See* Procedure for Amending Constitution of Canada, Part V of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.) ("hereinafter *Constitution Act, 1982*").
[10] *See* Richard H. Leach, "Implications for Federalism of the Reformed Constitution of Canada" (1982) 45 L. & Contemp. Probs. 149 at 156. It is unclear, however, whether the rules were intended to be permanent. The *Constitution Act, 1982* instructed Canada's first ministers to meet within fifteen years in an intergovernmental conference to review the Constitution's new amendment rules. *See Constitution Act, 1982*, Part V, s. 49. Canada's first ministers met on June 20-21, 1996, to review the Constitution's formal amendment rules. It is reported that the discussion on this subject "was of short duration and there was no decision on how further discussion might be pursued on this matter." Canadian Intergovernmental Conference Secretariat, First Ministers' Conferences 1906-2004, at 103, available online: http://www.scics.gc.ca/CMFiles/fmp_e.pdf (last visited December 1, 2015).

Lake Accord[11] and the 1992 Charlottetown Accord.[12] Both efforts failed, the former due in part to a time limitation for legislative ratification[13] and the latter as a result of outright public repudiation.[14] In an interesting twist, however, these formal amendment failures may have set into motion an informal constitutional change to Canada's formal amendment rules, driven by the creation of a new constitutional convention.[15] Therefore in failing to reform Canada's formal amendment rules, political actors may have inadvertently altered them by incorporating into the tradition of Canada's uncodified constitution a conventional requirement of national referendal consultation—an unwritten rule that is by definition altogether absent from the rules textually-prescribed in the *Constitution Act, 1982* for formally amending the Constitution of Canada.[16]

Commentators have suggested that the unsuccessful national referendum held in connection with the Charlottetown Accord has created an expectation of popular participation requiring national referendal consultation in future major constitutional reforms.[17] The argument seems compelling: in 1992, the federal government chose to require a national consultative referendum as part of the amendment process to ratify the Charlottetown Accord, and must therefore do so again in the future because the Charlottetown referendum has created a precedent that binds federal actors.[18] The question, then, is whether the federal government's decision to hold a referendum on the Charlottetown Accord has since matured into a constitutional convention.[19] If indeed the Charlottetown referendum is today a binding precedent entrenched as a convention in the unwritten Constitution of Canada, this change should be understood as an informal amendment to the written Constitution of Canada since Canada's formal amendment rules do not require direct popular participation to either propose or ratify an amendment.[20] They require only federal or provincial legislative action, or both in tandem, to formally amend the constitution.[21]

In this Article, I draw from constitutional law, history and theory to test the argument that the use of the referendum in the Charlottetown Accord has matured into a constitutional convention. I inquire specifically whether there now exists a convention that binds federal actors to hold a national referendum for any formal amendment to the basic structure of the Constitution of Canada.[22] I explore whether the convention operates in the context of what Peter Russell defines as "mega constitutional politics." Russell coined the term to refer to amendments that "address the

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[11] The 1987 Constitutional Accord, Ottawa, Ontario, June 3, 1987 ("Meech Lake Accord").
[12] Consensus Report on the Constitution: Final Text, Charlottetown, Prince Edward Island, August 28, 1992 (hereinafter "Charlottetown Accord").
[13] *See infra* text accompanying notes 33-42.
[14] *See infra* text accompanying notes 55-65.
[15] *See infra* text accompanying notes 94-101.
[16] *See Constitution Act, 1982*, Part V, ss. 38-49.
[17] *See infra* note 94.
[18] *See infra* text accompanying notes 94-99.
[19] In this Article, I will follow the Canadian practice of using the term *referendum* to refer both to binding and non-binding direct popular votes, although the scholarly literature distinguishes between a referendum, which is binding, and a plebiscite, which is non-binding. *See* Don Rowat, "Our Referendums are not Direct Democracy" (1998) 21 Can. Parl. Rev. 25 at 25. I will refer variously to either binding or non-binding referenda.
[20] *See Constitution Act, 1982*, Part V, ss. 38-49.
[21] *Ibid.*
[22] *See* Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (University of Toronto Press 1992) at 75.

very nature of the political community on which the constitution is based"[23] and that have a "tendency to touch citizens' sense of identity and self-worth."[24] He specifies that "mega constitutional politics, whether directed towards comprehensive constitutional change or not, is concerned with reaching agreement on the identity and fundamental principles of the body politic."[25] Mega constitutional politics, then, seek major reforms to the framework of government.

The Constitution of Canada's escalating structure of formal amendment identifies which matters trigger mega constitutional politics.[26] Amending the matters amendable pursuant to the default multilateral amendment procedure entrenched in Section 38 as well as those amendable pursuant only to the unanimity amendment procedure entrenched in Section 41 would result in a fundamental change to the polity, to Canadian identity, and to federal-provincial relations. In short, they would change the basic structure of the Constitution of Canada. These are the amendable matters for which I explore whether a federal convention of national referendal consultation has taken root. I conclude that we cannot know now whether such a convention has developed—not until federal political actors are again confronted with the question whether or not to hold a national referendum in connection with a change to the basic structure of the Constitution of Canada.[27]

I begin in Part II by returning to 1982. I trace very briefly the constitutional and political context surrounding the Charlottetown Accord and I explain the impetus urging political actors to initiate a referendum. In Part III, I examine the role and development of conventions in Canadian constitutional amendment in order to then evaluate, in Part IV, whether the Charlottetown referendum has created a binding federal precedent amounting to a constitutional convention on national referendal consulation for major constitutional reforms. I also return again to 1982 to suggest that the pressure currently building behind some form of popular participation in major constitutional reform in Canada is a response to the failure to properly give voice to the people in the process of patriation in 1982. In Part V, I close by suggesting, perhaps counterintuitively, that layering a requirement of national referendal consultation onto the existing requirements for formal amendments to the Constitution's basic structure could undermine democracy, despite our common association of referenda with democratic legitimacy. I suggest instead that a national referendum should be an alternative path, not an additional step, in constitutional amendment. I also reflect on the susceptibility of the Constitution of Canada to informal constitutional change.

II. THE CHARLOTTETOWN ACCORD REFERENDUM

The *Constitution Act, 1982* left unresolved many questions needing answers before constitutional peace could ever be possible in Canada, including whether and how to recognize the special status of Quebec, how to reform national institutions to assuage provincial alienation, and how to justly operationalize the right of self-government for First Nations.[28] The Meech Lake Accord, negotiated in 1987 only a few years after the patriation of the Constitution, sought to

[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*
[26] *See infra* text accompanying notes 81-88.
[27] In a related Article, I explain more fully the concept of "the basic structure" of a constitution with reference to the basic structure doctrine articulated by the Supreme Court of India. *See* Richard Albert, "The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada" (forthcoming 2016) 41 Queen's L.J.
[28] *See* Ronald L. Watts, "Three Decades of Periodic Federal Crises" (1996) 17 Int'l Pol. Sci. Rev. 353 at 357.

answer some of these questions.[29] But its principal purpose, to be sure, was reconciliating Quebec with the rest of Canada in the aftermath of the adoption the *Constitution Act, 1982* over objections from its provincial government.[30] The Accord was designed to address Quebec's five conditions for finally accepting the *Constitution Act, 1982*: recognition of its distinctiveness, a larger role in immigration, a role in Supreme Court appointments, limits on the federal spending power, and a veto on constitutional amendments.[31] In retrospect, one might fairly suggest that the Accord sought to end the "moral exclusion" of Quebec in constitutional politics.[32]

A. Meech Lake and its Consequences

The Meech Lake Accord proposed to amend both the *Constitution Act, 1867* and the *Constitution Act, 1982*. As to the former, it would have inserted a declaration that "Quebec constitutes within Canada a distinct society,"[33] it would have changed the method of senatorial selection to require Senate vacancies to be filled from a list of nominees proposed by provincial governments,[34] and it would have granted provinces some power over immigration.[35] Among other items, the Accord would also have constitutionalized the Supreme Court and required the prime minister to convene an annual conference of first ministers.[36] As to the *Constitution Act, 1982*, the Accord proposed to amend the rules of formal amendment, notably by granting a veto to all provinces in connection with amendments to matters of provincial interest such as proportional representation in the House of Commons, the Supreme Court, as well as senatorial powers, selection and representation.[37] The Accord also mandated additional constitutional conferences.[38]

The Meech Lake Accord ultimately collapsed in 1990 when political actors failed to ratify it by the three-year deadline arguably required for ratification.[39] Under Canada's formal amendment rules, some amendment proposals expire if they are not ratified within three years.[40] This temporal restriction applies to a specified class of amendments concerning proportional representation in the House of Commons, certain features of the Supreme Court, provincial

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[29] *See* Richard Simeon, "Meech Lake and Shifting Conceptions of Canadian Federalism" (1988) 14 Can. Pub. Pol'y Supp. S7 at S13-S21.
[30] *See* Samuel V. Laselva, *The Moral Foundations of Canadian Federalism* (McGill-Queen's University Press, 1996) at 192.
[31] *See* Peter W. Hogg, *Meech Lake Constitutional Accord Annotated* (Carswell, 1988) at 3-4.
[32] Pierre Fournier, *A Meech Lake Post-Mortem: Is Quebec Sovereignty Inevitable?* (McGill-Queen's University Press, 1991) at 15.
[33] *Meech Lake Accord*, at Schedule s. 1.
[34] *Ibid*. at Schedule s. 2.
[35] *Ibid*. at Schedule s. 3.
[36] *Ibid*. at Schedule ss. 6, 8.
[37] *Ibid*. at Schedule s. 9.
[38] *Ibid*. at Schedule s. 13.
[39] *See* Christopher P. Manfredi, "Institutional Design and the Politics of Constitutional Modification: Understanding Amendment Failure in the United States and Canada" (1997) 31 L. & Soc. Rev. 111 at 123. I qualify it as "arguably" required by the Constitution because it is not clear that the three-year deadline applied to the entire package of amendments. *See* F.L. Morton, "How Not to Amend the Constitution" (1989) 12 Can. Parl. Rev. 9 at 9-10. As I explain elsewhere, parts of the Accord triggered the three-year deadline and others did not, but political actors nevertheless chose to subject the entire accord to the three-year deadline since the Accord had been proposed as an omnibus bill of amendments. *See* Richard Albert, "Temporal Limitations in Constitutional Amendment" (draft on file with author).
[40] *See Constitution Act, 1982*, pt. V. s. 39(2).

creation and expansion, as well as senatorial powers, selection and representation.[41] The Accord had proposed to amend some of these matters, as well as other important subjects not subject to any temporal restrictions. The point is that political actors eventually ran out of time, though one might plausibly wonder whether ratification would have been possible with more time.[42]

The 1992 Charlottetown Accord was an effort to make up for both the substantive and procedural shortcomings that had felled the Meech Lake Accord.[43] This new Accord proposed a large-scale overhaul of the Constitution of Canada, even more transformative than the Meech Lake Accord would have been. The Charlottetown Accord proposed once again to recognize that Quebec is a "distinct society"[44] but it also proposed to entrench a "Canada Clause" that would have expressed Canadian values so as to guide judges in their interpretation of the Constitution.[45] In addition, the Accord would have more robustly recognized Aboriginal rights,[46] defined and in some cases redefined the terms of the federal distribution of powers,[47] reformed the Senate and the House of Common as well as the Supreme Court,[48] and it would have amended the rules of formal amendment themselves.[49] The Accord also sought to reinforce linguistic rights[50] and, as with the Meech Lake Accord, it also entrenched the annual requirement of a first ministers' conference.[51]

B. The Charlottetown Innovation

Canadian political actors took an unusual path to ratify the Charlottetown Accord. They submitted the entire Accord to the Canadian electorate in a national referendum. This form of referendal consultation was a constitutional innovation because the formal amendment rules entrenched in the Constitution of Canada did not then, nor do they now, require a national referendum to ratify an amendment.[52] The *Referendum Act*, passed roughly four months before the referendum, had authorized the Governor General "to obtain by means of a referendum the opinion of electors on any question relating to the Constitution of Canada."[53] By its terms, the referendum was not legally binding and did not constitute a mandatory part of the amendment process. As a legal matter, then, the referendum was purely consultative. It was intended only as a discretionary supplementary step in the formal process to adopt the amendment package, which required

[41] *Ibid.* at s. 42(1).
[42] Elijah Harper, a member of the Manitoba provincial legislature, was a holdout in granting unanimous consent to introduce the ratifying motion onto the floor. *See* Ian Peach, "The Power of a Single Feather: Meech Lake, Indigenous Resistance and the Evolution of Indigenous Politics in Canada" (20100) 16 Rev. Const. Stud. 1 at 10.
[43] *See, e.g.*, David R. Cameron & Jacqueline D. Krikorian, "Recognizing Quebec in the Constitution of Canada: Using the Bilateral Constitutional Amendment Process" (2008) 58 U. Toronto L.J. 389 at 393; Harold D. Clarke & Allan Kornberg, "The Politics and Economics of Constitutional Choice: Voting in Canada's 1992 National Referendum" (1994) 56 J. Pol. 940 at 942-44; Jeffrey J. Cole, "Canadian Discord Over the Charlottetown Accord: The Constitutional War to Win Quebec" (1993) 11 Dick. J. Int'l L. 627 at 642-44.
[44] *Charlottetown Accord*, at I.A.1.
[45] *Ibid.*
[46] *Ibid.* at I.A.2, IV
[47] *Ibid.* at I.B., III.
[48] *Ibid.* at II.A-C.
[49] *Ibid.* at IV.
[50] *Ibid.* at I.A.3.
[51] *Ibid.* at II.D.
[52] *Constitution Act, 1982*, Part V, ss. 38-49.
[53] Referendum Act, s. 3(1), S.C. 1992, c. 30.

approval resolutions from the Parliament of Canada and each of the provincial assemblies pursuant to the unanimity procedure in section 41 of the *Constitution Act, 1982*.[54]

The referendum question asked voters to answer whether they agreed that "the Constitution of Canada should be renewed on the basis of the [Charlottetown Accord]".[55] The Proclamation directing the referendum made clear that the referendum question had been approved by the House of Commons and the Senate, that it was "in the public interest" to "direct that the opinion of electors be obtained" on the question, and that provincial and territorial electors were called to participate.[56] Although the result of the referendum had been intended by law to be only advisory and not binding on political actors,[57] the political salience of a majority vote in favour of the Accord would have legitimated the amendment package and generated momentum to push it through ultimate ratification by the provincial assemblies.[58] It would have been unimaginable for provincial political actors to oppose the considered judgment of their constituents.[59] Indeed, the group of First Ministers had agreed not to seek formal ratification of the Accord unless it had first won majority approval in each province in the consultative referendum.[60]

Canadians ultimately rejected the Accord by a margin of 54.3 percent to 45.7 percent, with voters in only four of Canada's ten provinces and (at the time) two territories approving the amendment package.[61] Political actors thereafter chose not to proceed with the textually-prescribed procedures for formally ratifying the Accord in light of these results.

Scholars have attributed the failure of the Charlottetown Accord to many factors, from specific ones concerning the details of the package such as displeasure with the Canada Clause, confusion about how aboriginal self-government would work alongside federalism in Canada and unease with the constitutional veto power,[62] to more general theories for its failure, including

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[54] Peter W. Hogg, "The Difficulty of Amending the Constitution of Canada" (1993) 31 Osgoode Hall L.J. 41 at 42-43.

[55] Proclamation Directing a Referendum Relating to the Constitution of Canada, SI/92-180, Registered on 1992-10-07, available online: http://laws.justice.gc.ca/eng/regulations/SI-92-180/page-1.html (last visited December 1, 2015).

[56] *Ibid.* Quebec administered its own separate referendum on the matter. *See* Lawrence LeDuc, "Canada's Constitutional Referendum of 1992: A Great Big No" (1993) 12 Electoral Stud. 257 at 259.

[57] By provincial law, the referendum results in Alberta and British Columbia were binding upon their respective legislatures. *See* Constitutional Referendum Act, Rev. Stat. Alb. 2000, C-25, s.12(c) (Alberta); Constitutional Amendment Approval Act, Rev. Stat. B.C. 1996, C-67, s. 1 (B.C.); Referendum Act, Rev. Stat. B.C. 1996, C-400, s. 4 (B.C.).

[58] *See* Peter H. Russell, "The End of Mega Constitutional Politics in Canada?" (1993) 26 Pol. Sci. & Pol. 33 at 33.

[59] Indeed, then-Prime Minister Brian Mulroney said it would be "morally unacceptable" for political actors to proceed with the amendment package if voters had rejected it in even one province. *See* Jeffrey Ulbrich, "Campaign Winds Up for Monday's Referendum' *Associated Press* (25 October 1992), available online: http://www.apnewsarchive.com/1992/Campaign-Winds-Up-For-Monday-s-Referendum/id-75ee5f5fbc23c3e3685808917462accb (last visited December 1, 2015).

[60] Ian Greene, "Constitutional Amendment in Canada and the United States' in Stephen L. Newman (ed.), *Constitutional Politics in Canada and the United States* (State University of New York Press 2004) at 257.

[61] *See* The 1992 Federal Referendum—A Challenge Met: Report of the Chief Electoral Officer of Canada, at 58, January 17, 1994, available online: http://www.elections.ca/res/rep/off/1992/1992_Referendum_Part_2_E.pdf (last visited December 1, 2015).

[62] The Honourable Joseph A. Ghiz, The Dick, Ruth and Judy Bell Lecture: "An Insider's Perspective of Meech Lake & Charlottetown', Carleton University, Ottawa, October 20, 1993, available online: http://carleton.ca/fpa/wp-content/uploads/joe-ghiz-1993.pdf (last visited December 1, 2015). John Whyte also suggests that "popular sentiment recognized the element of political in minority community rights which, although essential to stabilizing the nation,

amendment overload[63] and the challenge that large-scale constitutional bargaining presents for successful amendment.[64] The best summation of the Accord's collapse, however, is this:

> The package Canadians rejected was formidably complex. It became so by a decade's accretion of elements, each calculated to appeal to, or to offset concessions to, groups excluded at an earlier stage—Quebec, the western provinces, and aboriginal peoples. Negotiators hoped that by 1992 they had finally found an equilibrium, a logroll sufficiently inclusive to survive referral to the people. Instead they seem to have gotten the logic of the logroll upside down: they may have overestimated both how much each group wanted what it got and how intensely some groups opposed key concessions to others.[65]

C. The Impetus for Referendal Consultation

The fatal flaw of the Meech Lake Accord was the process by which it had been drafted. Federal and provincial elites negotiated the accord in closed meetings that would later call into question elite-driven executive federalism as a democratically legitimate process for constitutional change in Canada.[66] The lead constitutional advisor to the Government of Canada at the time, Mary Dawson, has acknowledged the charges "that the deal had been cooked up behind closed doors by a group of men in suits."[67] As Dawson observes, "the *Charter* had given Canadians a sense of empowerment, and they were resisting what they characterized as secret deals."[68] As a consequence, the political actors who negotiated the details of the Charlottetown Accord rejected the secrecy of the Meech Lake Accord and instead embraced transparency.

It is important to ask how. Throughout the Charlottetown process, federal actors facilitated opportunities for public dialogue with citizens and interest groups, and they also undertook consultations with First Nations and territorial governments—and provincial actors followed suit.[69] The federal government created a Cabinet Committee on Canadian Unity and Constitutional Affairs that held roving meetings to consult directly with Canadians across the country.[70] The federal government also issued publications throughout the process to keep Canadians abreast of the questions and proposals along the way.[71] The process, at least on the federal government's end,

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can also be nation-fracturing." John Whyte, "Rejection of Charlottetown Accord Ended Era of Constitutional Reform', Toronto Star, October 26, 2012, available online: http://www.thestar.com/opinion/editorialopinion/2012/10/26/rejection_of_charlottetown_accord_ended_era_of_constitutional_reform.html (last visited December 1, 2015).

[63] *See* Christopher P. Manfredi & Michael Lusztig, "Why do Formal Amendments Fail? An Institutional Analysis" (1998) 50 World Politics 377 at 380.

[64] *See* Michael Lusztig, "Constitutional Paralysis: Why Canadian Constitutional Initiatives are Doomed to Fail" (1994) 27 Can. J. Pol. Sci. 747 at 748.

[65] Richard Johnston, "An Inverted Logroll: The Charlottetown Accord and the Referendum" (1993) 26 Pol. Sci. & Pol. 43 at 43.

[66] *See* Peter H. Russell, "Can the Canadians Be a Sovereign People?" (1991) 24 Can. J. Pol. Sci. 691 at 705-06.

[67] Mary Dawson, "From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown" (2012) 57 McGill L.J. 955 at 983.

[68] *Ibid.*

[69] *Ibid.* at 991-92

[70] *Ibid.* at 993.

[71] *Ibid.*

culminated with a series of televised conferences on different parts of the constitutional reform package, all intended to inform Canadians.[72] And when federal political actors met with their provincial, territorial and aboriginal counterparts to actually draft the Accord, they conducted their proceedings in private but then held public press briefings at the close of each day.[73] All of this raised a sharp contrast to the closed proceedings that had produced the Meech Lake Accord.

Other factors prompted the federal government to initiate a national referendum. For one, Quebec had committed to holding a referendum on its future in Canada by October 1992; Canada's national referendum on the Charlottetown Accord would satisfy that commitment in Quebec.[74] Second, some provinces had passed their own laws requiring consultative provincial referenda prior to their legislatures ratifying a constitutional amendment.[75] These provincial referenda highlight a third factor: the federal government had calculated that holding its own nation-wide referendum would allow it to exercise greater control over the administration of the referendum rather than leaving a matter of such high stakes to the vagaries of separate provincial political processes.[76] Fourth, a successful national referendum approving the Accord would have prevented the agreement from unraveling slowly between its drafting and provincial ratification, which is precisely what had happened to the Meech Lake Accord.[77]

Each of these reasons suggests that holding a referendum was a politically expedient choice. One might well wonder whether the federal government's decision to insert a consultative referendum into the process of constitutional amendment was driven instrumentally by political facts or by the government's perception of or belief in the intrinsic value of popular participation.[78] Indeed, Matthew Mendelsohn and Fred Cutler have observed that "Canadian political leaders had been coerced into holding a referendum and many observers felt that the political class was looking to orchestrate a response and seek legitimation, rather than engage in genuine consultation".[79]

Federal political actors had not been constitutionally obligated to submit the Charlottetown amendment package to a national referendum. After all, there is no mention of referendal consultation or ratification in the Constitution's formal amendment rules.[80] The *Constitution Act, 1982* creates five formal amendment thresholds, each requiring an escalating measure of federal or provincial legislative action, sometimes in tandem, with the applicable threshold rising in difficulty according to the functional or symbolic importance of the entrenched provision to be

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[72] *Ibid.* at 994.
[73] *Ibid.*
[74] *See* Laurence Morel, "The Rise of "Politically Obligatory" Referendums: The 2005 French Referendum in Comparative Perspective" (2007) 30 W. Eur. Pol. 1041 at 1048.
[75] Ronald L. Watts, "Processes of Constitutional Restructuring: The Canadian Experience in Comparative Context" (January 1999), Working Paper Series, Institute of Intergovernmental Relations, 7, available online: http://iigrwww.wp.queensu.ca/WorkingPapers/watts/wattsrestructure.pdf (last visited December 1, 2015).
[76] Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012) at 141.
[77] Lawrence LeDuc & Jon H. Pammett, "Referendum Voting: Attitudes and Behaviour in the 1992 Constitutional Referendum" (1995) 28 Can. J. Pol. Sci. 3 at 8.
[78] Michael B. Stein, "Improving the Process of Constitutional Reform in Canada: Lessons from the Meech Lake and Charlottetown Constitutional Rounds" (1997) 30 Can. J. Pol. Sci. 307 at 327.
[79] Matthew Mendelsohn & Fred Cutler, "The Effect of Referendums on Democratic Citizens: Information, Politicization, Efficacy and Tolerance" (2000) 30 British J. Pol. Sci. 685 at 698.
[80] *See Constitution Act, 1982*, Part V, ss. 38-49.

amended.[81] For example, the Constitution requires a lower quantum of political agreement to amend a narrow matter of concern only to the House of Commons than it does to amend a matter that concerns Canada's federal institutions, including the monarchy, the Supreme Court and the Senate.[82] This reflects a hierarchy of constitutional importance: the quantum of political agreement rises according to the importance assigned to the matter to be amended.[83]

These five formal amendment thresholds thus increase in difficulty. Under the unilateral provincial amendment power, a provincial assembly may amend its own provincial constitution by a simple law.[84] The unilateral federal amendment power confers an analogous power upon Parliament in respect of purely federal matters.[85] Under the regional amendment power, both houses of Parliament and the assembly of the affected province(s) must agree to an amendment that will affect some but not all provinces.[86] The general multilateral amendment power requires both houses of Parliament and two-thirds of provincial assemblies representing half of the total provincial population to agree to an amendment on various matters of national scope.[87] And the unanimous amendment power requires the agreement of both houses of Parliament and each of the provincial assemblies to amend Canada's most important institutions, principles and constitutional provisions.[88] None of these five rules requires or even mentions a referendum.

Nor did the *Referendum Act* make it compulsory for federal political actors to hold a consultative referendum on the Charlottetown Accord.[89] Political actors made a strategic choice to hold a referendum. History at the time was similarly conclusive that the use of a referendum was neither a necessary nor prudent step, as there had been no established practice of national referenda.[90] Yet the referendum became virtually politically imperative as a tool of legitimation after the failure of the elite-led and closed-door negotiations for the Meech Lake Accord.

III. PRECEDENT AND CONVENTION IN CONSTITUTIONAL AMENDMENT

The Charlottetown referendum was therefore believed to be a necessary innovation to supplement the codified rules of formal amendment. Of course, it is not unusual for political practice to depart from the constitutional text, particularly in Canada where the written constitution does not always reflect the living constitution.[91] Indeed it is accepted in Canada that a disjunction can emerge between the written and unwritten Constitution, the former entrenching a provision

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[81] *See* Richard Albert, "The Expressive Function of Constitutional Amendment Rules" (2013) 59 McGill L.J. 225 at 247-51.
[82] *Compare Constitution Act, 1982*, Part V, s. 41 *with Constitution Act, 1982*, Part V, ss. 41-43.
[83] Richard Albert, "The Structure of Constitutional Amendment Rules" (2014) 49 Wake Forest L. Rev. 913 at 962-63.
[84] *Constitution Act, 1982*, Part V, s. 45.
[85] *Ibid.* at s. 44.
[86] *Ibid.* at s. 43.
[87] *Ibid.* at s. 38(1).
[88] *Ibid.* at s. 41.
[89] *See* Referendum Act, *supra* note 53.
[90] Prior to the 1992 consultative referendum on the Charlottetown Accord, there had been only two national referenda, one in 1898 on prohibition and the other in 1942 on conscription. *See* Benoît Dostie & Ruth Dupré, ""The People's Will": Canadians and the 1898 Referendum on Alcohol Prohibition" (2012) 49 Explorations in Econ. Hist. 498 at 499.
[91] This point is particularly relevant to provincial secession. *See* Donna Greschner, "The Quebec Secession Reference: Goodbye to Part V?" (1998) 10 Const. Forum 19 at 23.

that the latter no longer recognizes as valid.[92] This is only one way that written constitutions commonly change informally over time as political actors alter their behavior and in turn also the social facts underlying the constitution. Accordingly it does not pose a problem for constitutional theory to recognize that the written constitution must be interpreted in light of unwritten principles.[93] Yet the susceptibility of the Constitution of Canada to informal changes like these raises a question worth asking: has the Charlottetown innovation matured into a constitutional convention that today binds federal political actors even though holding a referendum appears to defy the formal amendment rules entrenched in the text of the Constitution of Canada?

A. The Charlottetown Innovation: Precedent or Convention?

Commentators have suggested that the Charlottetown innovation has created an expectation of direct popular participation requiring national referendal consultation for future major constitutional reforms.[94] One observer states the point directly in terms of precedent: "the [Charlottetown] referendum created a precedent: Canadians must be consulted directly before political leaders attempt to alter the country's basic document."[95] The Charlottetown referendum, it is said, "marks the end of the era of elite accommodation in matters constitutional and the beginning of a new era of public consultation and ratification."[96] Therefore any process that fails to consult the public through a referendum "is likely to be perceived as illegitimate."[97]

On this majority view, the lesson of the failed Charlottetown Accord is that Canadians now perceive the Charlottetown innovation as a "binding precedent" and that it is no longer possible for political actors to approve major constitutional reforms through provincial legislatures alone.[98] The referendum is "a fact of constitutional reform in Canada now," the majority view continues, and although minor constitutional amendments would not require a referendum, major

[92] *See, e.g.*, David E. Smith, *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press 2013) at 43; Allan C. Hutchinson, "Constitutional Change and Constituitonal Amendment: A Canadian Conundrum" in Xenophon Contiades, ed., *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Abington, UK: Routledge 2013) 51 at 61-62; Albert, *supra* note 5, at 650-73; Richard Albert, "Constitutional Disuse or Desuetude" (2014) 94 B.U. L. Rev. 1029 at 1072-79; Martha A. Field, "The Differing Federalisms of Canada and the United States" (1992) 55 L. & Contemp. Probs. 107 at 118.

[93] *See Reference re: Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 49-54 ("Secession Reference").

[94] *See, e.g.*, Dawson, *supra* note 67, at 997; Peter Leslie, "Canada: The Supreme Court Sets Rules for the Secession of Quebec" (1999) 29 Publius 135 at 142; Kenneth McRoberts, "After the Referendum: Canada With or Without Quebec' in Kenneth McRoberts (ed.), *Beyond Quebec: Taking Stock of Canada* (McGill-Queen's University Press 1995) at 413; Matthew Mendelsohn, "Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics" (2000) 33 Can. J. Pol. Sci. 245 at 251; Christa Scholtz, "Aboriginal People and the Charlottetown Accord: Political Mobilization and Aboriginal Support for Constitutional Change" (June 2008) Paper presented to the Canadian Political Science Association Annual Meetings, at 14, available online: http://www.cpsa-acsp.ca/papers-2008/Scholtz.pdf (last visited December 1, 2015); Robert C. Vipond, "Seeing Canada Through the Referendum: Still a House Divided" (1993) 23 Publius 39 at 54; José Woehrling, "La modification par convention constitutionnelle du mode de designation des sénateurs canadiens" (2008-09) 39 Revue de droit de l'Université de Sherbrooke 115 at 125.

[95] Jeffrey Simpson, "The Referendum and its Aftermath' in Kenneth McRoberts and Patrick J. Monahan (eds), *The Charlottetown Accord, the Referendum, and the Future of Canada* (University of Toronto Press 1993) at 193.

[96] Michael Adams, "The October 1992 Canadian Constitutional Referendum: The Socio-Political Context' in *ibid.* at 192.

[97] R. Kent Weaver, "Political Institutions and Conflict Management in Canada" (1995) 538 Annals Am. Acad. Pol. & Soc. Sci. 54 at 65.

[98] Roger Gibbins & David Thomas, "Ten Lessons from the Referendum" (1992) 15 Can. Parl. Rev. 3 at 3.

constitutional reforms "will most likely require public ratification."[99] Commentators therefore regard the Charlottetown referendum as a precedent that future political actors must follow.

The minority view, in contrast, suggests that the Charlottetown referendum is not binding. For example, Benoît Pelletier speaks of "the 1992 precedent of the Charlottetown agreement, that suggests that a Canada-wide referendum be held for constitutional reform, a precedent which, for the time being, cannot, strictly speaking, be considered a constitutional convention."[100] And, in a short paragraph, Peter Meekison seems also to reject the majority view. Meekison argues that the Charlottetown experience was less about the centrality of referendal consultation *itself* than about the importance of facilitating some measure of popular involvement in future constitutional negotiations, though not necessarily in the form of a referendum.[101]

Neither the majority nor minority view appears to have been developed in any extensive detail, but the minority view has been even less well developed. More importantly, as I will explain, neither view is correct because we do not yet know whether the Charlottetown referendum has matured into a convention. We can, however, explore the question and project the circumstances that would tell us when and how to recognize now that a convention had taken root. The first step in determining whether the Charlottetown referendum is binding on federal political actors requires us to distinguish between precedent and convention—because the difference between the two concepts holds the answer to whether political actors must once again hold a national consultative referendum in the next round of constitutional reform.

Whether the Charlottetown referendum has created either a precedent or a convention is difficult to know without a standard against which to judge how a practice matures into a convention. Fortunately we can turn to an important illustration from Canadian constitutional history to understand how a practice becomes a convention. Prior to the *Constitution Act, 1982*, there was a convention on provincial consent to major constitutional reforms. The practice of provincial consultation eventually matured into a convention of provincial consent, and although the convention later became entrenched in the constitutional text, we may draw from this example in comparative perspective to explore whether the Charlottetown innovation has created a federal convention requiring national referendal consultation in major constitutional reforms in Canada.

B. Formal Amendment at Confederation

Canada's founding constitution did not entrench a formal federal amendment rule.[102] The formal amendment power belonged to the Parliament of the United Kingdom, which retained the exclusive authority to amend the *Constitution Act, 1867*, a colonial law that reflected its colonial qualities.[103] The only exception concerned provincial constitutions: the *Constitution Act, 1867* conferred upon provinces the unilateral power to amend their provincial constitution.[104] Over time,

[99] Kathy L. Brock, "Learning from Failure: Lessons from Charlottetown" (1993) 4 Const. Forum 29 at 32.
[100] Benoît Pelletier, "Reinventing Canada: The Challenges that Canada Faces in the Twenty-First Century" (2010) 4 J. Parl. & Pol. L. 133 at 142.
[101] J. Peter Meekison, "Canada's Quest for Constitutional Perfection" (1993) 4 Const. Forum 55 at 56.
[102] *See Constitution Act, 1867*.
[103] Peter W. Hogg, "A Comment on the Canadian Constitutional Crisis" (1980) 6 Yale Stud. World Pub. Ord. 285 at 287-88.
[104] *See Constitution Act, 1867*, Part VI, s. 92.

Canadian political actors came to expect the United Kingdom to pass an amendment only if it could claim broad support across Canada.[105] As a matter of law, any formal amendment would begin and end in the United Kingdom, but as a matter of political reality, the process began in Canada with a joint resolution of the House of Commons and the Senate requesting an amendment.[106] Before long, the United Kingdom would routinely agree to formally amend the Constitution of Canada in the manner requested by the joint resolution issued from Canada.[107]

The problem arose in 1949 when the United Kingdom amended the Constitution, at Canada's request, to confer upon the Canadian Parliament a similar unilateral amendment authority over purely federal subjects—a power the provinces already possessed over provincial subjects in their own provincial constitution.[108] The provinces worried that this new amendment would embolden the Canadian Parliament to exploit its unilateral amendment power over federal subjects to amend federal institutions of provincial concern without provincial consent.[109] This was a very reasonable concern. The textual silence left it unclear whether the federal government was obligated even to consult with let alone obtain the consent of the provinces—and if yes, of how many provinces—before requesting from the Parliament of the United Kingdom a major constitutional amendment affecting the basic federal structure of the Constitution of Canada.[110] The constitutional text did not entrench any formal amendment rule that answered this question.

Political practice, however, evolved over time to suggest that the Canadian Parliament would not seek an amendment affecting federal-provincial relations without the federal government first consulting with and obtaining the approval of the provinces. Of the sixteen instances of formal amendment between Confederation and 1964, ten amendments had concerned matters that were exclusively federal in nature according to the federal government, and therefore did not require provincial consultation.[111] As to the six amendments affecting federal-provincial relations, the federal government consulted with the affected provinces in each instance and in all but one case secured unanimous provincial consent.[112] This federal practice of seeking provincial approval for an amendment affecting federal-provincial relations appeared over time to evolve into something more than a practice. Indeed, in each of the unsuccessful intergovernmental negotiations from 1964 to 1980 on a new or revised constitution for Canada, the proposed rule for formally amending matters affecting federal-provincial relations reflected this practice of securing the consent of both federal and provincial governments to any major constitutional change.[113]

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[105] William Renwick Riddell, "Constitutional Amendments in Canada" (1919) 28 Yale L.J. 314 at 317.
[106] William R. Lederman, "Canadian Constitutional Amending Procedures: 1867-1982" (1984) 32 Am. J. Comp. L. 339 at 340.
[107] *Id.*; H.B. Mayo, "Majority Rule and the Constitution in Canada and the United States" (1957) 10 West. Pol. Q. 49 at 59.
[108] British North America (No. 2) Act, ch. 81, 12, 13 & 14 Geo. 6 (1949).
[109] William R. Lederman, *Notes on Recent Canadian Constitutional Developments*, 32 J. Comp. Legis. & Int'l L. 74 at 75-76 (1950).
[110] William S. Livingston, *The Amending Power of the Canadian Parliament*, 45 Am. Pol. Sci. Rev. 437 at 437-38 (1951).
[111] Guy Favreau, *The Amendment of the Constitution of Canada* (Ottawa: Queen's Printer 1965) at 16.
[112] *Ibid.* at 12-16.
[113] *See* James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Canada Communication Group Publishing 1996) at 34-54.

C. The Convention of Provincial Consent

These historical precedents raised the all-important question: is securing provincial consent to amendments affecting federal-provincial relations a practice or a convention? The Supreme Court of Canada answered this question in the *Patriation Reference* in 1981 in connection with a constitutional challenge to the federal government's intention to proceed unilaterally, without provincial consent, with only a joint resolution of both houses of the Parliament of Canada requesting from the United Kingdom a package of major constitutional reforms altering the basic federal structure of the Constitution of Canada.[114] The specific question before the Court was whether there exists a convention that the House of Commons and the Senate will not proceed unilaterally to affect major constitutional reform without first securing provincial agreement.[115]

The Court answered that there is indeed a convention of substantial provincial consent.[116] Looking to history, the Court noted that federal and provincial governments had for decades tried to reach agreement on formal amendment rules for the Constitution of Canada, and although they had failed each time, the quantification of provincial consent had invariably remained a central question in their deliberations.[117] This, for the Court, indicated "a clear recognition by all the governments concerned of the principle that a substantial degree of provincial consent is required."[118] But the Court left open the precise quantum of provincial consent required to respect the conventional requirement of provincial agreement. The Court declared only that "a substantial measure of provincial consent is required," something more than the agreement of two provinces and something less than unanimous agreement.[119] Anticipating the objection that a convention on provincial consent must reflect some specificity in order for political actors to operationalize it, the Court explained that major constitutional reform must be governed by flexible conventions until political actors manage to finally agree on the details of the formal amendment rules:

> Nor can it be said that this lack of precision is such as to prevent the principle from acquiring the constitutional *status* of a conventional rule. If a consensus had emerged on the measure of provincial agreement, an amending formula would quickly have been enacted and we would no longer be in the realm of conventions. To demand as much precision as if this were the case and as if the rule were a legal one is tantamount to denying that this area of the Canadian constitution is capable of being governed by conventional rules.[120]

The Court's answer prompted the federal government to reconsider its unilateralism and instead to convene multilateral discussions to negotiate the package of amendments that would later become the *Constitution Act, 1982*. Canada's new constitutional text would entrench complex formal amendment rules that retained both the federal and provincial unilateral powers of formal

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[114] *Reference re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 ("Patriation Reference").
[115] *Ibid.* at 875.
[116] *Ibid.* at 904.
[117] *Ibid.* at 904.
[118] *Ibid.* at 905.
[119] *Ibid.* at 904-05.
[120] *Ibid.* at 904.

amendment over matters under their respective exclusive jurisdiction.[121] Canada's new formal amendment rules would also entrench the convention of provincial consent for major constitutional reform within a larger structure of escalating thresholds requiring a different quantum of provincial agreement depending on the importance of the matter of federal-provincial concern to be amended.[122] Amendments affecting one or more but not all provinces would require the consent of both houses of Parliament and of the affected provinces.[123] One class of amendments affecting all provinces would require the consent of both houses of Parliament as well as of seven provinces representing at least half of the total provincial population.[124] And another class of amendments affecting all provinces would require the consent of both houses of Parliament and of all provinces.[125] These rules remain in force today, though not without some controversy.[126]

IV. REFERENDAL CONSULTATION IN CONSTITUTIONAL AMENDMENT

The Court's analysis in the Patriation Reference—specifically relating to how the federal government's practice of consulting with provinces eventually matured into a convention—is instructive for evaluating whether there now exists a convention that binds federal political actors to hold a national referendal consultation for major constitutional reforms in Canada. I stress here the parameters of the inquiry into the existence or not of the convention under question: the question is whether there now exists a convention that governs the conduct of federal political actors, not provincial or territorial political actors, to hold a referendum to consult Canadians across the country on a proposed amendment or package of amendments to the basic structure of the Constitution. If such a convention exists, it would have consequences for the conduct of provincial and territorial political actors. Their conduct would be driven by the conduct of federal political actors, whose own conduct would be governed by this convention, if indeed it exists.

The Court is a critical actor for identifying the existence of a constitutional convention. As H.L.A. Hart explained, the most relevant community for recognizing the binding quality of a rule is the legal elite.[127] Of course, the legal elite take action both in support of and in response to popular will, but it falls to political actors in the legal elite to choose what to recognize as valid and what conduct to credit. Hart understood a convention as a "shared acceptance,"[128] a guiding norm that need not be stated abut that must be perceived by political actors as non-discretionary.[129]

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[121] *See Constitution Act, 1982*, s. 44 (authorizing the Parliament of Canada to amend matters relating to purely federal subjects), s. 45 (authorizing provincial legislatures to amend matters relating to their own provincial constitution).
[122] *See* Albert, *supra* note 81, at 250.
[123] *Constitution Act, 1982*, s. 43.
[124] *Ibid.* at s. 38.
[125] *Ibid*. at s. 41.
[126] Despite this intricate escalating structure of formal amendment, there remain unresolved questions about which particular amendment rule governs specific kinds of amendment. *See Reference re Senate Reform*, [2014] 1 S.C.R. 704 ("Senate Reform Reference"). Moreover, Quebec was not a signatory to the new constitution, and has yet to ratify it. *See* Michael Seymour, "Quebec and Canada at the Crossroads: A Nation Within a Nation" (2000) 6 Nations & Nationalism 227 at 248.
[127] H.L.A. Hart, *The Concept of Law* (Oxford University Press, 2d ed. 1994) at 256.
[128] *Ibid.* at 102.
[129] *Ibid.* at 101.

A convention therefore exercises a regulatory function on political actors: it regulates their conduct and expectations by creating a body of common understandings, habits and practices.[130]

A. Conventions in Canadian Courts

Courts will not enforce conventions but they will recognize them, as the Court did in the Patriation Reference.[131] The Court gave four reasons why it will not enforce them: first, conventions are not statutory rules that courts ordinarily interpret and apply; second, conventions are rooted in precedents established by political actors and not in judicial precedents like common law rules; third, the legal system does not contemplate any formal sanction for breaching conventions because sanctions, if any are to follow, would be political, not legal; and fourth, conventions are by nature often in conflict with legal rules that courts are bound to enforce.[132] This tension between convention and law "prevents the courts from enforcing conventions [and] also prevents conventions from crystallizing into laws, unless it be by statutory adoption."[133]

Courts will nonetheless recognize conventions. Insofar as the main purpose of a convention is "to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period,"[134] a convention forms an integral if unwritten part of a regime's constitution and may sometimes be even more important than its laws.[135] The Court observed in the Reference that this is uncontroversially true in Canada insofar as the preamble of the *Constitution Act, 1867* highlights the centrality of conventions to the constitutional system.[136] The Court was right to note that conventions operate against the backdrop of the prevailing constitutional values *of the period* because conventions are not fixed points. They are neither eternal nor unconditional: they may be overridden by sustained contrary practice or, short of reversal, they may evolve both predictably and unpredictably as political actors alter their practices.[137] Yet despite their unwrittenness and their non-enforceability in courts, conventions reflect a certain empirical simplicity because they "ultimately reflect what people do."[138]

Identifying a convention requires more than counting occurrences of a practice, however. In the Reference, the Court relied on Ivor Jennings' three-part test to evaluate whether the federal government was bound by a convention of securing substantial provincial consent for fundamental constitutional change where federal-provincial interests are engaged.[139] To establish that a convention exists, Jennings explained that "we have to ask ourselves three questions: first, what

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[130] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund, 8th ed. 1982) at cxli.
[131] Whether Canadian courts *should* recognize conventions is of course a controversial question. *See* Eugene A. Forsey, "The Courts and the Conventions of the Constitution" (1984) 33 U.N.B.L.J. 11 at 38-42.
[132] *Patriation Reference*, *supra* note 114, at 880-81.
[133] *Ibid*. at 882.
[134] *Ibid*. at 880.
[135] *Ibid*. at 883.
[136] *Ibid*.
[137] Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984) at 217.
[138] *Ibid.* In this respect, conventions are stable insofar as they are rooted in the predictable practices of political actors. Yet conventions are also changeable by the very political actors whose conduct determines whether or not a convention has matured in a constitutional democracy.
[139] *Patriation Reference*, *supra* note 114, at 888.

are the precedents, secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?"[140] The Court determined that political actors had established a precedent of securing provincial consent, and thereafter had continued for decades to follow the precedent because they had grown to feel bound by it.[141] But the Court noted that political actors followed the rule for a reason, not out of convenience or habit: securing provincial consent was consistent with and indeed necessitated by Canada's federal character.[142] The Court also observed that for any constitutional change affecting federal-provincial relations, "the federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities."[143]

B. The Law and Politics of Referenda in Constitutional Amendment

The three-part Jennings test provides a framework to evaluate whether there is a convention that binds federal actors to hold a national referendum on future reforms to the basic structure of the Constitution of Canada. The answer to the first question—whether there are precedents—risks being obscured by insufficient specificity as to the precise practice for which we must identify precedents. Whether there are *any* precedents in Canada on holding referenda is not the right question to ask nor is the right question whether there are precedents of the federal government holding referenda. Examining the history of referenda in Canada yields the perception that referenda are common occurrences.[144] The federal government has administered three referenda over the years,[145] and provinces and territories have held dozens of referenda of their own on subjects as varied as women's suffrage, public health insurance, balanced budget legislation, daylight savings time and electoral recall.[146] Yet this long record of referenda in Canada is not relevant to the essential focus of the first question into whether a convention exists. That question can be answered only by asking whether there are precedents on holding national referenda on constitutional amendment. On this point, Canadian history is clear: the Charlottetown innovation is the only instance of national referendal consultation relating to a constitutional amendment.[147]

That there is only one prior instance of national referendal consultation would seem to foreclose the possibility of a convention. Jennings, after all, insisted that political actors are not

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[140] Sir Ivor Jennings, *The Law and The Constitution* (University of London Press, 5th ed. 1967) at 136. An important critique of the Jennings test argues that conventions may arise variously from precedential practice, by agreement without prior precedent, from an authoritative unilateral declaration by important political actors, and from constitutional principle. *See* Andrew Heard, "Constitutional Conventions: The Heart of the Living Constitution" (2012) J. Parl. & Pol. L. 319 at 332-37. While I acknowledge the critique, I nonetheless apply the Jennings test because it remains, at least for now, the conventional method to evaluate whether a practice has matured into a convention.

[141] *Patriation Reference*, *supra* note 114, at 888-94.

[142] *Ibid*. at 905-09.

[143] *Ibid.* 905-06.

[144] The question of Quebec sovereignty, which has been tested in two referenda since 1980, further strengthens the perception of frequent referenda in Canada.

[145] *See* Elizabeth Goodyear-Grant & Cameron Anderson, "Public Support for Direct Democracy in Canada: The "Post-Charlottetown" Era and Beyond" (2004) Paper presented to the Canadian Political Science Association Annual Meetings, 2-3, available online: http://www.cpsa-acsp.ca/papers-2004/Goodyear-Grant-Anderson.pdf (last visited December 1, 2015).

[146] *See* Patrick Boyer, *Direct Democracy in Canada: The History and Future of Referendums* (Dundurn Press 1996) at 190-222, 259-60.

[147] *See* Daniel Turp, "Solutions to the Future of Canada and Québec After the October 26th Referendum: Genuine Sovereignties Within a Novel Union" (1993) 4 Const. Forum 47 at 47.

bound to act in a certain way simply because they may have once in the past behaved in a particular way.[148] The search for precedent to support the existence of a convention generally requires more than one instance of a particular conduct, although Jennings did concede that "a single precedent with a good reason *may be enough* to establish the rule."[149] This is not to suggest that a string of precedents on its own is enough to create a convention that will govern the conduct of political actors. For Jennings, one occurrence is not enough but neither is a series of identical occurrences. Mere practice, as Jennings writes, is insufficient on its own to establish a convention: "the fact that an authority has always behaved in a certain way is no warrant for saying that it ought to behave in that way."[150] Creating a convention turns on something more than the frequency of occurrences.

Yet the Charlottetown innovation is not the only relevant precedent. As Andrew Heard observes, the first part of the Jennings test leaves unanswered whether one should consider both positive and negative precedents.[151] This is an important question, according to Heard, because "sometimes, what did not happen and why can be just as revealing, or even more so, than what has happened."[152] We should therefore also look for negative precedents on the use of referenda in constitutional amendment, specifically for occasions where political actors have rejected the use of referenda in constitutional amendment. There is indeed one such important negative precedent.

The negative precedent dates to 1980, when the federal government prepared a joint resolution for both houses of Parliament to unilaterally patriate the Constitution of Canada.[153] The joint resolution proposed a package of amendments on a multiplicity of matters but none was more controversial than the proposed formal amendment rules. The joint resolution created two general amendment procedures. The first authorized an amendment with resolutions from both houses of Parliament as well as well a majority of provincial legislatures meeting specific quorum requirements by population and geography.[154] The second general amendment procedure authorized an amendment by a referendum proposed by both houses of Parliament and ratified by a majority of participating voters, including a majority of voters in a specific geographical distribution of provinces across western, central and eastern Canada.[155] The joint resolution therefore proposed to give the Parliament of Canada the option of pursuing a general amendment to the Constitution of Canada either via provincial legislative ratification or referendal ratification.

Despite the federal government's initial insistence that it would stand firm behind preserving the referendum option,[156] the proposal to entrench an option of referendal ratification in the formal amendment process did not survive the patriation negotiations,[157] and ultimately led

[148] Jennings, *supra* note 140, at 135.
[149] *Ibid.* at 136. (emphasis added)
[150] *Ibid*. at 134-35.
[151] Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law & Politics* (Oxford University Press, 2d ed. 2014) at 14.
[152] *Ibid*.
[153] *See Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada* (October 2, 1980), Government of Canada, document 25005-2-10-80.
[154] *Ibid*. at s. 41.
[155] *Ibid.* at s. 43.
[156] *See* John Ferguson, "PM Won't Budge on BNA Proposal to End Deadlocks with Referendum', Globe and Mail (Canada), Oct. 17, 1980.
[157] *See* David Close, "Politics and Constitutional Reform in Canada: A Study in Political Opposition" (1985) 15 Publius 161 at 167-68.

to the Patriation Reference.[158] The proposal for referendal ratification in constitutional amendment was unusual given that it had never before been discussed at a federal-provincial conference nor more generally in the country.[159] It was a "radically new"[160] device in constitutional amendment. The Official Opposition denounced the referendum option as contrary to Canada's structure of government, which it viewed as anchored in the separation of powers between federal and provincial government. The Opposition argued that the federal government was now "trying to change that division by having constitutional amendments approved by referendum, rather than provincial legislatures."[161] Opponents worried that the referendum option could lead to "the tyranny of the 51 percent majority"[162] and were therefore reluctant to support it because it "rais[ed] a constant threat that the federal Government will go it alone on future amendments."[163]

The provinces rejected the referendum proposal.[164] The referendal path would have given the federal government the option of seeking to ratify an amendment by national referendum even where the provincial governments had withheld their consent to the amendment.[165] No other proposal drew greater resistance from provinces.[166] Provinces worried that the federal government would use referenda to marginalize them.[167] In an editorial, a leading national newspaper observed that the referendum option would allow the federal government to "ride roughshod over the Legislatures."[168] The referendum proposal was seen as an anti-provincial federal "weapon ... for use in overcoming provincial opposition to substantive constitutional amendments."[169] There was one further reason to oppose the referendum option: referenda, opponents argued at the time, could exacerbate the existing regional divisions in Canada by highlighting them in the results of the referendum. Saskatchewan Premier Allan Blakeney thus argued that "the whole idea of a referendum as a way to weld this country more closely together when the regional pulls are strong is ill-conceived."[170] There were many reasons to oppose the referendal option. This is an important negative precedent that weighs against seeing the referendum as a conventional requirement.

The second inquiry in the three-part Jennings test informs the first: do political actors feel themselves bound by the precedents? Just as the first inquiry must be framed at the lowest level of abstraction in order to isolate the nub of the matter—whether there is a federal convention of national referendal consultation in major constitutional reform—this second inquiry must similarly

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[158] *See Patriation Reference*, *supra* note 114, at 765-66.
[159] Richard Simeon, "An Overview of the Trudeau Constitutional Proposals" (1981) 19 Alta. L. Rev. 391 at 392-93.
[160] *See* Jake Epp, "It's Not Just Another Flag Debate, Tory MP Says in Rejecting Proposal', Globe and Mail (Canada), Feb. 18, 1981.
[161] *See* Geoffrey Stevens, "A Rude Shock', Globe and Mail (Canada), Oct. 21, 1980.
[162] John Gray, "Lawrence Volunteers to Advise the Queen on Patriation Plans', Globe and Mail (Canada), Oct. 8, 1980 (quoting Jake Epp, Member of Parliament).
[163] *See* Robert Sheppard, "Referendums: Sticking Point at Centre of BNA Controversy', Globe and Mail (Canada), Nov. 18, 1980.
[164] Thomas Walkom, "Confidential Poll Taken for Premiers: Trudeau BNA Plan is Divisive, 60% Say' Globe and Mail (Canada), Aug. 19, 1981.
[165] *See* Jeff Sallot, "Blakeney Sees Hope for Scaled-Down Package', Globe and Mail (Canada), Feb. 25, 1981.
[166] Alain C. Cairns, "Citizen (Outsiders) and Government (Insiders) in Constitution-Making: The Case of Meech Lake" (1988) 14 Can. Pub. Pol. Supp. S121 at S143.
[167] J.R. Mallory, "Conflict Management in the Canadian Federal System" (1981) 44 L. & Contemp. Probs. 231 at 242.
[168] Editorial, "What He Didn't Mention', Globe and Mail (Canada), Dec. 30, 1980.
[169] Editorial, "Britain and Canada', Globe and Mail (Canada), Nov. 5, 1980.
[170] Canadian Press, "Saskatchewan Dashes Trudeau's Last Chance for an Ally in the West', Globe and Mail (Canada), Feb. 20, 1981.

be framed with specificity so as not to elide over important distinctions. It is important to recall that were a national consultation like the Charlottetown referendum to occur in the future, it would be ordered, controlled and administered by the Parliament of Canada, the federal government and federal institutions.[171] Consequently it matters less whether provincial or territorial political actors feel bound by the Charlottetown precedent than whether political actors at the federal level specifically feel bound by it. The point is not that provincial referenda are irrelevant to major constitutional reform. Indeed, as I suggest below, they may ultimately be directly relevant to the formation of a convention on national referendal consultation. But we must focus on whether *federal* actors feel themselves bound by the Charlottetown innovation because this inquiry is concerned only on whether there is a federal convention of national referendal consultation.

Focusing on whether provincial or territorial political actors are bound by a convention of referendal consultation would distort the inquiry because many provinces and territories have enacted laws that require referendal consultation, with some requiring binding ratification before approving an amendment to the Constitution of Canada. For instance, Alberta's *Constitutional Referendum Act* requires a provincial referendum "before a resolution authorizing an amendment to the Constitution of Canada is voted on by the Legislative Assembly."[172] By provincial law, the result of the provincial referendum is binding on the government that initiated the referendum.[173]

British Columbia's *Constitutional Amendment Approval Act* and its *Referendum Act* likewise require respectively that "the government must not introduce a motion for a resolution of the Legislative Assembly authorizing an amendment to the Constitution of Canada unless a referendum has first been conducted under the *Referendum Act* with respect to the subject matter of that resolution"[174] and also that the referendum result "is binding on the government that initiated the referendum."[175] Other provinces and territories authorize but do not require their governments to hold referenda. Of these referendal laws, certain ones make their results binding on the provincial or territorial government[176] whereas others make them simply advisory.[177] Some provincial and territorial political actors are therefore constrained by law.[178] These various provincial and territorial laws may eventually by accumulation force the creation of a national

[171] *See* Editorial, "A Charter of Loopholes', Globe and Mail (Canada), Mar. 27, 1981.
[172] Rev. Stat. Alb. 2000, C-25, s. 2(1).
[173] *Ibid.* at s. 4.
[174] Rev. Stat. B.C. 1996, C-67, s. 1.
[175] Rev. Stat. B.C. 1996, C-400, s. 4.
[176] *See Referendum Act*, S.N.B. 2011, c. 23, ss. 12-13 (New Brunswick) (establishing quorum requirement for binding government); *The Referendum and Plebiscite Act*, Stat. Sask. 1990-91, c R-8.01, s. 4 (Saskatchewan) (establishing quorum and threshold requirements for binding government); *Public Government Act*, Stat. Yuk. 1992, c-10, s. 7 (Yukon) (authoring legislature to decide *ex ante* whether referendum will bind government).
[177] *See, e.g.*, *Consolidation of Plebiscite Act*, R.S.N.W.T. 1998, c. P-8, s. 5 (Nunavut); *Elections and Plebiscites Act*, S.NW.T. 2006, c. 15, s. 48 (Northwest Territories); *La Loi sur la consultation populaire*, L.R.Q. 2000, c. C-64.1, s. 7 (Quebec); *Plebiscites Act*, R.S.P.E.I. 1991, c.32, s. 1 (Prince Edward Island); *see also Elections Act*, S.N.L. 1992, c. E-3.1, s. 218 (Newfoundland) (authorizing non-binding plebiscite on amendment to Constitution of Canada).
[178] There are two other noteworthy examples of provincial referendal legislation but neither requires a binding referendum in connection with an amendment to the Constitution of Canada. In Manitoba, certain proposed tax increases must first be approved by the electorate in a referendum. *See* The Balanced Budget, Fiscal Management and Taxpayer Accountability Act, C.C.S.M., c. B5, s.10 (Manitoba). In Nova Scotia, the province may not sell liquor unless the municipality in which the province proposes to sell liquor grants its approval. *See* An Act to Provide for the Regulation and Sale of Alcoholic Liquors, Rev. Stat. N.S., c. 260, ss. 43-46 (Nova Scotia).

standard for referendal consultation, in which case federal actors would be responding to provincial and territorial pressures. Provincial and territorial actors would remain bound by law.

There are no similar laws requiring federal political actors to consult Canadians in a referendum before proposing a constitutional amendment to the basic structure of the Constitution of Canada. The federal *Referendum Act* authorizes the federal government to hold a referendum in connection with a constitutional amendment, but it does not make referendal consultation compulsory. The law instead confers broad discretionary authority upon the federal government to hold one should it be in the "public interest."[179] In light of the limited scope of the *Referendum Act*, Canada's formal amendment rules evidently reflect the entire codification of the binding rules of amendment. Yet the question remains whether there are any unwritten rules to formal amendment, namely, in our inquiry, a federal convention on national referendal consultation.[180] Were federal political actors to feel bound by the Charlottetown precedent, this would suggest that they had come to believe that adhering to the Constitution of Canada's textually-entrenched procedures for formal amendment was a necessary though insufficient condition for achieving major constitutional reform. The rule of recognition would have compelled them to recognize the legitimacy-conferring function of national referendal consultation as an unwritten though obligatory prerequisite for formally amending the basic structure of the Constitution of Canada.

In light of Hart's view that the most relevant community for recognizing the binding quality of a rule is the legal elite, it is worth inquiring into the Court's view. This is not a dispositive point but it is important and useful to consider. Had the Charlottetown innovation matured into a constitutional convention, it is possible though not necessary that the Court would have acknowledged it when it issued its recent advisory opinion on constitutional reforms to the Senate.[181] The Court, as discussed above,[182] had earlier recognized though not enforced the convention on substantial provincial agreement for amendments affecting federal-provincial relations.[183] The Court's advisory opinion on Senate reform was prompted by the Government's request for clarity on the amendment process required to change the method of Senator selection, to establish fixed terms of senatorial tenure, and to abolish the Senate, among other proposals.[184]

Although the Court did invoke in the Senate Reform Refence its earlier validation in the Patriation Reference of a convention requiring substantial provincial consent for amendments affecting federal-provincial relations,[185] the Court did not discuss referendal consultation in its opinion on Senate reform. The Court did, however, explain that the *Constitution Act, 1982* "provides the blueprint for how to amend the Constitution of Canada" and that "it tells us what changes Parliament and the provincial legislatures can make unilaterally, what changes require substantial federal and provincial consent, and what changes require unanimous agreement."[186] Where constitutional amendment touches upon Canada's federal structure, the *Constitution Act,*

[179] *See Referendum Act*, *supra* note 53, s. 3(1).
[180] Elsewhere, I have explored the unwritten rules of formal amendment in Canada. *See* Richard Albert, *The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada*, 41 Queen's L.J. (forthcoming 2016).
[181] *Senate Reform Reference*, *supra* note 126.
[182] *See supra* Section III.C.
[183] *See supra* discussion accompanying notes 116-20.
[184] *Senate Reform Reference*, *supra* note 126, at para. 5.
[185] *Ibid.* at para. 29.
[186] *Ibid.* at para. 28.

1982 requires approval from the Parliament of Canada and a significant representation of provinces.[187] The Court examined each of the five procedures for formally amending the Constitution of Canada under the *Constitution Act, 1982*'s escalating amendment framework, and in no case did it suggest that those procedures were insufficient for a formal amendment.[188]

On the contrary, the Court interpreted these procedures as necessary and sufficient for their respective class of formal amendments.[189] The Court identified the scope of the political consent required for each proposed constitutional amendment concerning the Senate. The Court confirmed that changing the method of Senator selection would require conformity with Sections 38 and 42 of the *Constitution Act, 1982*, specifically the agreement of both houses of the Parliament of Canada as well as seven of the provinces representing at least half of the total population.[190] The Court concluded that the same consent threshold in Section 38 applies to formally amending Senate terms, for instance were the proposal is to impose fixed terms of service.[191] With respect to the amendment proposal to abolish the Senate, the Court observed that it "would fundamentally alter our constitutional architecture—by removing the bicameral form of government that gives shape to the *Constitution Act, 1867*,"[192] suggesting that the amendment would profoundly change the Constitution of Canada. Yet even this most fundamental of formal amendments to the Constitution of Canada would not, for the Court, require referendal consultation; the Court declared that Section 41's unanimity procedure would govern Senate abolition, requiring the agreement of both houses of Parliament and each of the provincial legislatures.[193] The Court therefore did not recognize the importance of referendal consultation.[194] Again, I stress that this point is not dispositive, though it does raise a useful contrast to the Patriation Reference

The Court did, however, discuss the role of referenda in the Secession Reference. The Court acknowledged that referenda "appeal to some of the same principles that underlie the legitimacy of the Constitution itself, namely, democracy and self-government."[195] The Court moreover noted that referenda are an important tool for governance in constitutional democracy, but made it clear that the Constitution neither provides for their use nor gives them legal force:

> Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion.[196]

The Court suggested that political actors could allow themselves to be guided by a referendum result but emphasized that the final choice must be made through the institutions of representative

[187] *Ibid*. at para. 29.
[188] *Ibid*. at paras 33-48.
[189] *Ibid*.
[190] *Ibid.* at para. 53.
[191] *Ibid.* at para. 82.
[192] *Ibid.* at para. 97.
[193] *Ibid.* at para. 110.
[194] *See* Hart, *supra* note 127, at 256.
[195] *Secession Reference*, *supra* note 93, at para. 75.
[196] *Ibid*. at para. 87.

government. Political actors, the Court wrote, "may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people."[197] For the Court, therefore, the Constitution is clear today in not requiring referendal ratification for constitutional amendments, major or not.

There remains the third part of the inquiry into whether a convention exists: is there a reason for the rule?[198] The answers to the first two parts of the inquiry may seem to obviate the need to answer the third, but Jennings cautioned care in applying his formula where there exists only one precedent: "a single precedent," stressed Jennings, "with good reason may be enough to establish the rule."[199] The reason for the Charlottetown innovation may therefore be sufficiently compelling so as to transform its single occurrence into a conventional rule that binds federal actors to hold a national referendum. Jennings offered little guidance on how to evaluate the sufficiency of the reason supporting the convention, stating only that the creation of a convention "must be normative"[200] and "must be due to the reason of the thing because it accords with the prevailing political philosophy."[201] Jennings added that the creation of a convention "helps to make the democratic system operate; it enables the machinery of State to run more smoothly; and if it were not there friction would result."[202] Jennings appears to be privileging three factors in evaluating the sufficiency of the reason for the rule: normativity, consistency, and efficiency.

Normativity relates to the principle underlying the practice. There must be a principled reason for following a political practice, which later matures into a convention. The leading scholar of Canadian constitutional conventions, Andrew Heard, observes that absent a reason for adhering to a political practice, "the obligation could simply be one of conformity to tradition, policy preference," or "mere habit."[203] These reasons for rule-following are insufficient to create a convention inasmuch as they are not supported by a governing principle that gives the reasons "any force as rules of constitutional morality."[204] Measuring the Charlottetown innovation against this factor does not yield a clear answer as to whether the normative justification for the practice is either satisfied or lacking. As discussed above,[205] the Charlottetown precedent appears to have arisen out of instrumental not intrinsic reasons. Political actors do not appear to have been motivated by a commitment to the intrinsic value of popular participation in major constitutional reform; they appear instead to have been motivated by political expediency.[206]

On its own, the matter of normativity cannot determine whether a convention exists. But it is central to the inquiry, though in this case it is not clear whether the Charlottetown innovation fulfills the normativity factor. On one view, the instrumental purpose of federal political actors suggests the absence of the normativity required in order to recognize a rule as a convention. Yet on another view, the instrumental motivation for holding the Charlottetown referendum could be

[197] *Ibid*. at para. 88.
[198] *Jennings*, *supra* note 140, at 136.
[199] *Ibid*. at 135.
[200] *Ibid*.
[201] *Ibid*. at 136.
[202] *Ibid.* at 136.
[203] Heard, *supra* note 151, at 17.
[204] *Ibid*.
[205] *See supra* Section II.B.
[206] *Ibid.*

understood to reflect a normative justification anchored in democratic legitimacy. Federal political actors, on this account, thought it necessary to respond to the call for more participatory forms of democracy in the aftermath of the failure of the Meech Lake Accord. Their solution, one of many possible options, was to hold a referendum, which they did of their own volition, not under duress.

Consistency and efficiency, however, appear lacking in our evaluation of the justification for the Charlottetown innovation. As discussed above,[207] Canada has no history of national referendal consultation in constitutional amendment, nor is there in the country an overwhelming record of national referendal consultation more generally. Indeed, there is an important and recent negative precedent suggesting that national referenda are a point of contention for provincial premiers.[208] It is therefore difficult to support the argument that the Charlottetown innovation "accords with the prevailing political philosophy.[209] With regard to efficiency—Jennings' view that the practice must help the democratic system operate more smoothly[210]—if federal political actors were bound by a convention of national referendal consultation, this would only further complicate the already onerous multilateral amendment process for major constitutional reform.[211]

For now, one cannot state that there is a federal convention of national referendal consultation in major constitutional reform in Canada. The Charlottetown innovation is the only instance of referendal consultation for a constitutional amendment, and it is one of only three national referenda in Canadian history.[212] That provinces have a longer record of consultative referenda speaks to their own local history and practices, not to the question whether there exists a convention that binds federal political actors to hold a referendum on major constitutional reforms. The Court has not recognized the existence of such a convention, even when faced with a question directly related to the rules for major constitutional reform.[213] The Court instead interpreted the formal amendment rules entrenched in the *Constitution Act, 1982* as necessary and sufficient conditions for effecting changes to the basic structure of the Constitution of Canada.[214] Moreover, the Charlottetown innovation appears on one view to be lacking in consistency and efficiency as well as in its normative foundation. The referendum appears to have been motivated by instrumental reasons in response to the procedural deficiencies in connection with the Meech Lake Accord, not by intrinsic justifications on the value of participatory democracy.[215] There is,

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[207] *See supra* text accompanying notes 144-50.
[208] *See supra* text accompanying notes 151-70.
[209] Jennings, *supra* note 140, at 136.
[210] *Ibid.*
[211] Formal amendment in Canada is incredibly complex. *See* Katherine Swinton, "Amending the Canadian Constitution: Lessons from Meech Lake" (1992) 42 U. Toronto L.J. 139 at 144. This is attributable partly to the federalization of constitutional politics. *See* Bettina Petersohn, "Constitutional Reform and Federal Dynamics: Causes and Effects' in Arthur Benz & Jörg Broschek (eds), *Federal Dynamics: Continuity, Change, and the Varieties of Federalism* (Oxford University Press 2013) at 316. It is also due to the need for mass input and legitimation. *See* Michael Lusztig, *supra* note 64, at 748. The difficulty of formal amendment in Canada is also exacerbated by the 1996 regional veto law, *see* An Act Respecting Constitutional Amendments, S.C. 1996, c. 1 (1996), which effectively gives each of four provinces a veto in major constitutional reform under Section 38. *See* Andrew Heard & Tim Swartz, "The Regional Veto Formula and its Effects on Canada's Constitutional Amendment Process" (1997) 30 Can. J. Pol. Sci. 339 at 351.
[212] *See* Boyer, *supra* note 146, at 7 n.32.
[213] *See Senate Reform Reference*, *supra* note 126, at paras. 33-48.
[214] *See ibid.*
[215] *See supra* text accompanying notes 66-90.

however, an alternative view of normativity worth keeping in mind. Applying the Jennings test suggests, on balance, that a convention of federal referendal consultation does not yet exist.

Nonetheless it would misunderstand the nature of conventions to conclude today, in the absence of concrete political facts, that there does or not exist a convention of federal referendal consultation. We cannot know whether federal political actors feel bound to conform their conduct to a precedent until federal political actors reach a decision point compelling a choice. Only then can we know if a convention has taken root. Evaluating whether or not a convention exists therefore entails both a theoretical inquiry, which I have sought to develop with reference to the Jennings test, as well as an empirical inquiry that requires a set of facts that confront federal political actors. Where political actors in the future engage in constitutional reform amounting to mega-constitutional politics, we will know that a federal convention on national referendal consultation exists if federal actors elect to submit their amendment proposals to a referendum.

It is not difficult, however, to imagine that future political actors would feel bound by the Charlottetown innovation. Were more provinces and territories to adopt the Albertan and British Columbian model of requiring their governments by law to hold a referendum prior to any action on a proposed amendment to the Constitution of Canada, there could eventually emerge an expectation of subnational referenda across the country. As provinces and territories conducted these referenda, binding or not, and as it became a norm of subnational government in Canada to consult formally with citizens on whether to ratify a proposed amendment to the Constitution of Canada, the federal government and the provinces and territories might well agree that these consultative referenda are best conducted as a single national consultative referendum. The referendum would be administered under federal law by the independent federal election agency, paid for with federal funds, and subject to national standards. What would impede this scenario is the continuing infrequency of major constitutional reform. In order for a federal convention on national referendal consultation to take root, there must be new efforts to amend the Constitution, and so far there have been none since the failure of the Charlottetown Accord, largely due to the political impossibility, perceived or real, of major constitutional reform initiatives in Canada.[216]

C. Popular Constitutional Redesign

We can interpret the impetus toward referendal consultation in Canada in terms both internal to Canadian constitutional politics and in others altogether external. On the internal account, the pressure currently building behind some form of popular participation in major constitutional reform in Canada is a response to the failure to properly give voice to the people in the process of patriation in 1982. On the external account, the pressure aligns with the larger trend in the democratic world toward some measure of popular participation in the design and redesign of constitutions. Both are descriptive accounts but they are rooted in deep normative foundations.

Return to the patriation of the Constitution. Rather than seeking to legitimate the new constitution with the consent of Canadians in a national referendum, political actors ratified the constitution among themselves in an act of executive federalism, leaving the people noticeably

[216] For a discussion of the costs to political careers of the failed Charlottetown Accord, *see* David McLaughlin, *Poisoned Chalice: The Last Campaign of the Progressive Conservative Party?* (Dundurn Press Limited 1994) at 5-36.

uninvolved in what should have been an act of popular, not elite, legitimation. Reflecting in 1984 on Canada's missed democratic moment, Bruce Ackerman and Robert Charney observed that Canada had "neither completely succeeded in adapting British parliamentary sovereignty nor fully domesticated American popular sovereignty to Canadian purposes," and thus stood at "the constitutional crossroads,"[217] faced with many open questions crying out for resolution. None of those questions, noted Ackerman and Charney, was more important than whether Canadians would eventually give themselves their own constitution instead of accepting what elites had given them:

> Perhaps a generation from now, after another exhausting series of referenda on the provincial and the federal level, both Anglophone and Francophone voters will approve a mutually satisfactory constitution, one that hands down the law to the parliaments of Canada in the name of We the People of Canada.[218]

Part of what they Ackerman and Charney had envisioned came true. There were indeed a series of referenda within the next generation, as we know in connection with the Charlottetown Accord, but approval did not follow, nor did Canadians ever speak in one voice to adopt a constitution that bore their imprint of legitimation. On the contrary, the subsequent efforts at constitutional renewal reinforced many of the old fault lines around which patriation had occurred and the failed attempts to revise the Constitution also created new divisions. Today, then, we remain at much the same constitutional crossroads where Ackerman and Charney found Canada thirty years ago.

These crossroads are the same ones that compelled Peter Russell to ask if Canadians ever could be a sovereign people.[219] The question remains unanswered. When the Court wrote in the Secession Reference that "the Constitution is the expression of the sovereignty of the people of Canada,"[220] it was speaking of the exercise of sovereignty in its mediated and metaphorical sense, not in its most meaningful sense of actual popular consent. The people of Canada have yet to give their direct consent to the Constitution. This fact of Canadian constitutional life does not undermine the Constitution's legal force, nor does it make the *Charter of Rights and Freedoms* any less of a symbol of Canadian identity it has become, nor does it detract from the extraordinary influence of the Canadian Constitution around the world. But the Constitution's missing democratic moment of popular consent does highlight its drought of sociological legitimacy.

The rise of provincial and territorial laws requiring some form of popular consultation prior to ratifying an amendment can therefore be understood as an effort to breathe into the Constitution the sociological legitimacy it has long lacked. A ratification referendum can serve a cluster of legitimacy-conferring functions: it makes it more likely that citizens will identify with the constitution, it makes the constitution-making process seem fair to the governed, and it helps instill a culture of citizenship oriented toward democratic norms of deliberation and participation.[221] It will take more than subnational referenda on constitutional amendments to give the Constitution of Canada the popular legitimacy it requires in this modern era. Only an inclusive and informed

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[217] Bruce A. Ackerman & Robert E. Charney, "Canada at the Constitutional Crossroads" (1984) 34 U. Toronto. L.J. 117 at 133.
[218] *Ibid*. at 134.
[219] Russell, *supra* note 22.
[220] *Secession Reference*, *supra* note 93, at para. 85.
[221] *See* Jeffrey A. Lenowitz, "'A Trust That Cannot Be De1egated': The Invention of Ratification Referenda" (November 2015) Am. Pol. Sci. Rev. at 12.

national referendum on either a major constitutional amendment or a new constitution altogether can give Canada its needed democratic moment to finally legitimate the Constitution.

Around the world, constitutional democracies are living their own democratic moments, even in places where referenda are not the norm. In Britain, for example, the paradigmatic if declining model of parliamentary sovereignty does not recognize referenda as a necessary part or sufficient form of constitutional change. But the prime minister's decision to hold a referendum on the country's future in the European Union is evidence of the global pressure toward popular decisionmaking, if only as a matter of consultation and not necessarily of binding commitment to the outcome. For a country without a codified constitution, Britain's referendum vote, whether yea or nay, could nonetheless produce a major constitutional change, though unwritten. While it has in recent years not always been the case that referenda have been used to ratify new constitutions—for instance neither Tunisia in 2014 nor Nepal in 2015 ratified the constitution by referendum—we have seen referenda used to adopt new constitutions in Iraq in 2005, Bolivia in 2009, Kenya in 2010, Zimbabwe in 2013 and Egypt in 2014. These are only a few examples but they reflect a powerful trend, since World War II, of increasing forms and frequency of popular participation in constitutional design, whether before, during or after the drafting of the constitutional text.[222]

This modern trend toward popular participation began in France and the United States, whose revolutionary traditions have made the will of the people central to constitutional meaning. Modern constitutional states like Brazil, India, Ireland, Italy and South Africa have lived through their own democratic moments to legitimate their constitution. Some of these moments have been easier than others, but all have resulted in consolidating a democracy in which all if not most members of the polity feel that the constitution is theirs. Some countries, perhaps most notably Germany, have of course tried to moderate the influence of direct popular participation. But they have nonetheless evolved methods to fill their constitution with sociological legitimacy, something that continues in many ways to escape the Constitution of Canada. The pressure building toward popular participation in Canada is therefore something to be embraced, not suppressed, because only through Canadians themselves may the Constitution ultimately be legitimated.

V. CONCLUSION

No constitutional text is a comprehensive catalogue of the constitutional rules that political actors recognize as binding. This is especially true in Canada, whose founding constitution is a statute "expected to embody the principles of the British parliamentary system, which rest for the most part on convention rather than law."[223] These conventional understandings of the constitution exert a non-trivial constraint on political actors, and indeed simulate the binding effect of a written constitutional rule.[224] Conventions reflect the constitutional morality of the regime—a moral code that informally, though no less effectively, governs the conduct of political actors.[225] Conventions arise by sustained political practice and may change thereafter by subsequent practice.[226] There is

[222] Justin Blount et al., "Does the Process of Constitution-Making Matter?" in Tom Ginsburg, ed., *Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2012) 31 at 38-39.
[223] William S. Livingston, "The Amending Power of the Canadian Parliament" (1951) 45 Am. Pol. Sci. Rev. 437 at 438.
[224] *See* Albert, *supra* note 4.
[225] Dicey, *supra* note 130, at cxli.
[226] Marshall, *supra* note 140, at 217.

then, as Hans Kelsen noted, "no legal possibility of preventing a constitution from being modified by way of custom, even if the constitution has the character of statutory law, if it is a so-called 'written' constitution,"[227] as these unwritten alterations informally amend the written constitution, either by filling or creating a void in text or by substituting or refining the text.[228]

It has long been recognized that the Constitution of Canada is susceptible to informal change as a result of a new convention.[229] For example, I have demonstrated elsewhere that the Constitution of Canada has been changed by new conventions on the non-use of the British and Canadian powers of disallowance and reservation.[230] I have also shown how a new conventional understanding has arisen, specifically with reference to Canada, to make an ordinarily amendable constitutional provision unamendable.[231] Canada is therefore an important site for studying the interaction between unwritten constitutional norms and an entrenched constitutional text. But despite the extraordinary attention given to the use of referenda in Canada, it has thus far remained under-explored whether the Charlottetown innovation has informally amended the Constitution of Canada to establish a new federal convention of national referendal consultation on major constitutional reforms. Some commentators have suggested that political actors are bound by the precedent of the Charlottetown referendum and others have of course suggested the contrary.[232]

I have endeavored in this Article to show that we cannot yet know whether such convention has taken root in Canada. Although I have concluded that the Jennings test suggests that there is no convention of national referendal consultation—there has been only one instance of national referendal consultation, federal political actors are not bound by that single instance, nor was the Charlottetown innovation designed on a strong normative foundation—the Jennings test cannot by itself tell us how political actors *will* act. Until federal political actors are faced with a choice between holding a referendum or not, it remains unclear whether a federal convention exists. Should political actors opt in connection with a future major constitutional reform to hold a referendum, it may well be because they feel they have no choice but to seek popular input and consent, in which case we will know that they feel bound by the Charlottetown innovation. For now, though, the Charlottetown referendum cannot yet be called a convention without more information that can come only in another large-scale effort to amend the Constitution of Canada.

Nonetheless, it is plausible to predict that national referendal consultation will become an unwritten requirement of the constitutional amendment process for major constitutional reforms to the basic structure of the Constitution of Canada. But this informal change is less likely to arise in the near-term out of a concretized federal convention on referendal consultation than from the various laws and practices of provincial referendal consulation and ratification as they multiply across provinces to eventually normalize the use of referenda in each of the provinces and territories. Even still, this new constitutional convention would be a subnational one rooted in provincial and territorial political practice, not a federal convention anchored in federal practice.

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[227] Hans Kelsen, *General Theory of Law and State* (Harvard University 1945) at 259.
[228] *See* Albert, *supra* note 4.
[229] *See* Hurley, *supra* note 108, at 14.
[230] *See* Albert, *supra* note 5, 650-73.
[231] *See* Albert, *supra* note 6, at 672-74.
[232] *See supra* text accompanying notes 94-101.

What is worrisome, in my view, is that a federal convention on referendal consultation could do more harm than good to democracy in Canada. The formal amendment rules entrenched in the *Constitution Act, 1982* already make the Constitution of Canada one of the world's most resistant to major constitutional reform, if not the most difficult to amend.[233] To layer a federal conventional requirement of national referendal consultation onto the existing requirements for amendments to the basic structure of the Constitution of Canada would further complicate formal amendment, transforming a constitution that is at present freely amendable, perhaps in theory alone, into a constitution whose basic structure is in practice constructively unamendable.[234]

We commonly associate referenda with democratic legitimacy.[235] There are of course dangers with referenda—for instance that they might undermine the institutions of representative democracy—but the greater risk is that a federal convention on national referendal consultation would undermine democracy itself by frustrating all future major constitutional reform efforts. The most fundamental of all democratic rights in a constitutional democracy is the right of self-definition, most directly reflected in the power of constitutional amendment.[236] The power to amend the constitution is more than a mere procedural right; it is the core democratic right that authorizes those subject to the constitution to redesign the constitution when necessary to keep it in line with their shared values.[237] When the constitutional text becomes unchangeable and when its rules of change do more to prevent than to facilitate self-government, the first casualties are democracy and the rule of law.[238] It is of course a design choice to balance constitutional flexibility with stability, the risk being that the Constitution will be either too difficult or too easy to amend.[239] But the lesser of the two evils, in my view, is a more amendable constitution than a frozen one.

Referenda are useful vehicles to foster a culture of participatory democracy when they are incorporated into a larger program to enhance citizen participation. But it makes little sense as a matter of democratic constitutional design to require political actors in Canada to satisfy all of the existing textually-entrenched thresholds for an amendment to the basic structure of the Constitution while also making referendal consultation an additional necessary condition of amendment. This would risk making it actually impossible to successfully pass a major formal amendment to the basic structure of the Constitution of Canada. The better design is to create

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[233] *See* Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53 Alberta L. Rev. 85. At the adoption of the *Constitution Act, 1982*, Canada's new formal amendment rules were described as "unduly rigid." Walter Dellinger, "The Amending Process in Canada and the United States: A Comparative Perspective" (1982) 45 L. & Contemp. Probs. 283 at 300. In hindsight, it was justifiable to worry that the *Constitution Act, 1982* could "prove to be only a Pyrrhic victory, a largely symbolic success that will effectively bring the process to a halt." Michael B. Stein, "Canadian Constitutional Reform, 1927-1982: A Comparative Case Analysis Over Time" (1984) 14 Publius 121 at 139. Today, it is difficult to argue with Peter Oliver, one of Canada's leading comparativists, that Canada's formal amendment rules are "probably the most complex in the world." Peter Oliver, "Canada, Quebec, and Constitutional Amendment" (1999) 49 U. Toronto L.J. 519 at 520.

[234] *See generally* Richard Albert, "Constructive Unamendability in Canada and the United States" (2014) 67 Sup. Ct. L. Rev. (2d) 181 (theorizing the concept of "constructive unamendability," which results from a political climate that makes it practically unthinkable, though always theoretically possible, to amend the constitution).

[235] *See* Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012) at 261-62.

[236] *See* Richard Albert, "Counterconstitutionalism" (2008) 31 Dalhousie L.J. 1 at 49-51.

[237] *See* Richard Albert, "Constitutional Handcuffs" (2010) 42 Ariz. St. L.J. 663 at 698-99.

[238] *See* Richard Albert, "Nonconstitutional Amendments" (2009) 22 Can. J. L. & Juris. 5 at 8-9.

[239] *See* Emmett Macfarlane, "Unsteady Architecture: Ambiguity, the Senate Reference, and the Future of Constitutional Amendment in Canada" (2015) 60 McGill L.J. 883 at 903.

alternative paths to major constitutional reform: one that proceeds through the existing rules of formal amendment, and another that authorizes political actors to make major constitutional reforms when authorized by a successful national referendum.

We therefore confront a paradox: in order to preserve the democratic right of constitutional amendment in Canada, major constitutional reform should not require national referendal consultation unless a national referendum becomes an alternative path, not an additional step, in constitutional amendment. The problem, of course, is that amending Canada's formal amendment rules requires the unanimous agreement of both houses of Parliament and of each province,[240] a threshold that today seems virtually impossible to meet. Until the political climate becomes more amenable to the possibility of a grand federal bargain and as long as political actors feel themselves bound by the constitutional text, we will be constrained by the Constitution's formal amendment rules to live with the challenge of near-unamendability. The costs of unamendability are not insignificant,[241] and the consequence may well be that the power of constitutional change will shift as a matter of necessity, if it has not already done so,[242] from formal amendment by legislative actors in Parliament and provincial assemblies to informal amendment largely by the judiciary.

[240] *Constitution Act, 1982*, pt. V, s. 41(e).
[241] *See* Albert, *supra* note 3, at 724-36.
[242] *See* Dennis Baker & Mark Jarvis, "The End of Informal Constitutional Change in Canada?" in Emmett Macfarlane, ed., *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, forthcoming 2016).